Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1067

JAMES S. PADOR,
Petitioner,

vs.

THE PEOPLE OF THE TERRITORY OF GUAM,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

1. Does a reference in prosecutor's opening statement to defendant's silence after Miranda warnings, without more, require automatic reversal of the conviction where in fact defendant did not remain silent but made a statement which was suppressed?

STATEMENT OF THE CASE

At the outset of the trial the Court said to the Jury:

> THE COURT: Ladies and Gentlemen of the Jury, at this time Mr. Wagner will make an opening statement; and then I must caution you that anything he might say is not to be considered as evidence in the case. The purpose of an opening statement is to tell you what he intends to prove.
>
> (Transcript at 17)

Mr. Wagner restated this to the jury before beginning his outline of the facts he intended to prove. (Transcript at 17.)

His opening statement covered ten pages in the transcript. About midway through his presentation Mr. Wagner made the reference which is the subject of this petition:

> ". . . The police found the address of Mr. Pador . . . and they went over to see Mr. Pador; to see what he had to contribute, what explanation he could make. The police went to the home of Mr. Pador. He admitted his identity. He made certain admissions under certain circumstances, which will be explained to you; as a result of which—and after being warned of his constitutional rights—remained silent. The police then placed him under arrest and took him to (the) Agana Lock-up."
>
> (Transcript at 21)

No further mention of silence whatsoever was made by Mr. Wagner. As a matter of fact Pador did not remain silent. Detective J. Q. Acfalle testified Pador was given his rights. Defense counsel's objections prevented him from relating what Pador said. He did testify that Pador did say something. (Transcript at 174, lines 22, 23.)

Thereafter the Jury was excused and hearing was had on defendant's motion to suppress. The motion was granted as to the statement made after defendant received the *Miranda* warnings which the Court held to be constitutionally insufficient.

REASONS FOR DENYING THE WRIT

1. THIS COURT HAS HELD COMMENTS BY A PROSECUTOR OR COURT ON A DEFENDANT'S FAILURE TO TAKE THE STAND DOES NOT AUTOMATICALLY REQUIRE REVERSAL BUT ARE TO BE CONSIDERED IN THE LIGHT OF THE DOCTRINE OF HARMLESS ERROR.

This rule was established in *Chapman v. California,* 386 U.S. 23, 87 S.Ct. 824 (1967) where, under the facts, there was no doubt the error was harmful. In making it clear that some constitutional error can be harmless the Court said at page 827:

> [4] We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very

useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed that result of the trial. *We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.* (Footnotes omitted, emphasis added.)

In the instant case, the prosecutor's reference in his opening statement to post *Miranda* warning silence of Pador was harmless error beyond a reasonable doubt.

Prejudicial error, when a defendant's Fifth Amendment right against self incrimination is violated, occurs when his silence is used against him. The cases so holding involve use of the silence either in the presentation of evidence or comment in argument. The purpose is to give the jury an opportunity to draw an inference unfavorable to defendant.

In *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229 (1965) the Court held comment by the prosecutor or instructions by the Court that defendant's silence is evidence of guilt, is unconstitutional. In this case the California Constitution permitted comment. The Court said at page 1232:

> "... It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance."

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976) held the use of defendant's silence for impeachment purposes, under the circumstances of that case, unconstitutional. This case did not hold every such use unconstitutional regardless of whether or not it prejudiced the accused as petitioner suggests.

The Court said at page 2245:

> "The State has not claimed that such use in the circumstances of this case might have been harmless error."

The Court thus leaves the way open to raise the issue of harmless error in an appropriate case. It did not say the issue would not have been considered had it been raised.

All the cases cited by defendant deal with the use of silence as evidence at the trial, in closing argument or both, by the prosecutor. None deals with the situation we have here, a mention of silence in the opening statement with no attempt by the prosecutor to draw from this an inference of guilt.

2. THE DECISIONS OF THE FLORIDA SUPREME COURT REFUSING TO RECOGNIZE AND APPLY THE CHAPMAN DOCTRINE OF HARMLESS ERROR ARE NOT CONTROLLING ON THIS COURT AND SUCH CONFLICT IS NOT A PROPER GROUND FOR GRANTING THE WRIT.

In *Thomas v. State* (Fla. App.) 342 So.2d 991 (1977) the Court said:

> *"The principle of law is now established that any comment upon an accused's exercise of his right to*

> *remain silent is reversible error without regard to the harmless error doctrine.* Bennett v. State, 316 So.2d 41 (Fla. 1975); Shannon v. State, 335 So.2d 5 (Fla. 1976). This legal principle has recently been interpreted to the point where it is now considered a deprivation of due process to allow the accused's silence at the time of arrest to be used to impeach the accused's explanation subsequently offered at trial. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976); Davis v. State, 342 So.2d 987 (Fla. 3d DCA, released this same day)." (Emphasis added)

This may be the law in Florida but this case is not good authority in any other jurisdiction. The reliance on *Doyle* for this proposition is misplaced as has been seen. It is significant that the constitutional errors in the Florida cases would most probably be held not harmless beyond a reasonable doubt but the issue was neither raised nor discussed. The Court simply stated the rule as a foregone conclusion.

Before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California,* supra. In enunciating this rule the Court set the standard for applying the rule that judgments shall not be reversed for errors or defects which do not affect the substantial rights of the parties. The Court says at 87 S.Ct. 827:

> ". . . None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude

> that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, constistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

Decisions of the United States Supreme Court are the ultimate authority as to matters involving the application of the Constitution. Since such decisions are binding on the states, it follows that the Florida decisions in conflict with *Chapman* cannot be used as authority to grant a writ in this case.

3. THE NINTH CIRCUIT'S HOLDING "BEYOND A REASONABLE DOUBT, THAT UNDER THE CIRCUMSTANCES OF THIS CASE, THE PROSECUTOR'S STATEMENT WAS HARMLESS" IS CLEARLY CORRECT.

This case involved the rivalry of Pador and one Paoule, the victim, for the affections of a Korean girl, Song Cha DeWitt.

While Pador and Song Cha were at the Surf Club on the night of the crime, Paoule came in, had a brief conversation with her and left. Later Pador took the girl home in his car. While in the car Pador loaded his gun saying someone was going to get killed.

When they arrived at the Polynesian Apartments, Paoule was there. There was a struggle between him and Pador. Pador left the fight, went to his car, got the loaded gun, came back and shot and killed Paoule.

When the police went to Pador's house he said he was waiting for the complaint and would surrender. This was the statement which was admitted into evidence at the suppression hearing and referred to in the opening statement of the prosecutor as "certain admissions".

It is difficult to understand what Mr. Wagner meant by the reference to silence in his opening statement. It was not intended as a comment on defendant's failure to make a statement after being given *Miranda* warnings. At the trial the jury learned defendant did make a statement which was suppressed. Nor was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *Hayes v. United States,* 368 F.2d 814 (9th Cir. 1966); *Brown v. United States,* 370 F.2d 876 (9th Cir. 1966), cert. denied, 386 U.S. 1039, 87 S.Ct. 1494 (1967).

Defense counsel did not naturally and necessarily take this as such comment. Otherwise there would have been an immediate objection. It was only after reading the transcript that defense counsel saw this as a possible ground for a motion for mistrial. The jury did not have these words repeated to them in written form. It is not possible that they could have considered this as evidence of guilt which influenced their verdict.

They based their verdict solely on the evidence, which was overwhelming, not upon an inference, which was not even drawn by defense counsel until he saw the statement in writing several days after it was made.

CONCLUSION

For the foregoing reasons a writ of certiorari should not issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated this 16th day of January, 1979.

Respectfully submitted,

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